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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In Re Grand Jury Matter

ANTONI GRONOWICZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AUTHORS LEAGUE OF AMERICA, INC. IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a federal grand jury investigation of the truth or falsity of factual statements in a book?

2. Whether the First Amendment precludes the government from compelling the author of the book to testify or produce documents in such an investigation?

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

With the written consent of the parties, The Authors League submits this brief in support of Antoni Gronowicz's petition for a writ of certiorari. The League is the national society of professional authors and dramatists, and expresses the views of its 14,000 members

on First Amendment issues. It has submitted briefs to this Court in appeals involving those issues. It files this brief to urge that a writ of certiorari be granted because the decision below raises unprecedented First Amendment questions of great importance to authors and others who disseminate information to the public, which urgently require review by this Court.

REASONS FOR GRANTING THE WRIT

Introduction: Impact Of The Court of Appeal's Opinion On on Authors and Journalists.

The Court of Appeals held that the United States constitutionally can mount a grand jury investigation into the alleged falsity of statements about Pope John Paul II, made by petitioner in his book GOD'S BROKER. That conclusion, unprecedented in First Amendment jurisprudence, enormously expands the govern-

ment's power to subject the author of a dissenting or controversial work to a grand jury inquisition about the truth of his book, and to mail fraud prosecution under 18 U.S.C. Sec. 1341, by claiming it contains false factual statements and alleging these induced a publisher to issue the book.

The Court's opinion does not limit this repressive power, and its chilling effect on other authors, to those areas where the scope of First Amendment protection is qualified; i.e. suits for libel or invasion of privacy, and prosecutions for obscenity, sedition or uttering "fighting words". (cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2 (1942)). GOD'S BROKER is not defamatory and was not charged with any of these other transgressions.

Rather, the opinion holds that

grand juries may probe the alleged falsity of factual statements in books or articles on people and subjects of intense public interest, areas where the First Amendment was thought to guarantee uninhibited freedom of expression.

The chilling effect of this newly-discovered power of investigation and prosecution is mind-boggling. Not since the Sedition Act of 1798 has the government sought such power to restrict freedom of expression. If the decision below is allowed to stand, authors can be deterred from publishing factual statements on "dangerous" issues and powerful individuals and officials by the threat of a grand jury mail-fraud investigation, or subsequent prosecution.

The opinion, moreover, does not limit this power of investigation to an extrinsic fraud. There is no claim that

petitioner used forged evidence to persuade his publishers that the book's allegedly false accounts of interviews with the Pope were bona fide; it is not charged, for example, that he gave them fabricated tapes of the Papal interviews. To the contrary, the fraudulent material charged is intrinsic to GOD'S BROKER, i.e. the book's accounts of petitioner's interviews with the Pope. Indeed, the majority opinion stressed the grand jury had to "examine the accuracy of its (the book's) contents" since Gronowicz's representations to his publisher and the putative film producer mirrored those portions of the book dealing with "the extent of Gronowicz's personal contact with Pope John Paul II." A8. See also: Justice Hunter's opinion, A19-20 and Justice Higgenbotham's opinion, A25-26.

The decision below raises unprecedented and important First Amendment issues concerning the government´s power to conduct a grand jury investigation of the truth of factual statements in a book that is well within the the protective boundries of the First Amendment; a work such as GOD´S BROKER which deals with political, social and religious subjects, and the views and utterances of one of the world´s most powerful leaders. The Authors League submits the Court should grant the writ so that it can resolve these vital issues which are bound arise repeatedly, because of the decision below, and will have a drastic impact on authors and journalists.

1. THE FIRST AMENDMENT PROHIBITS GRAND JURY INVESTIGATIONS OF THE TRUTH OR FALSITY OF FACTUAL STATEMENTS IN PETITIONER'S BOOK

A. The First Amendment Protects False Statements Of Fact Against Post-Publication Restraints

The Court of Appeals held that unqualified First Amendment protection is only available against "prior restraint upon the dissemination of truthful information." A8. We believe it erred.

First Amendment protection applies with equal force to restraints after publication. Holding a post-publication restraint unconstitutional in Smith v. California, 361 U.S. 147 (1949), the Court said:

> "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v. New York, 333 U.S. 507, 509-610, 517-518." (p. 151)

Nor is the Amendment's protection

restricted because the author wrote his book to earn income. "It is of course no matter that the dissemination takes place under commercial auspices. See Joseph Burstyn Inc. v. Wilson, 343 U.S. 495; Grosjean v. American Press Co., 297 U.S. 233.", Smith v. California, supra, at. p. 150.

As Judge Hunter and Judge Sloviter concluded, the First Amendment barred the grand jury's investigation of alleged false factual statements in GOD'S BROKER because it protects false as well as true factual accounts against the restraints inherent in such inquisitions and threats of criminal sanctions. The First Amendment's guarantees are not subject to "any test of truth" and "erroneous statement ... must be protected if the freedoms of expression are to have the 'breathing space' that 'they need ... to

survive...'", New York Times v. Sullivan, 376 U.S. 254, 271-272 (1964). The authorities cited by Judge Hunter sustain his conclusion that:

> "established Supreme Court precedent supports the position that false speech, not alleged to be defamatory, receives protection under the First Amendment." A21

The government does not charge that GOD'S BROKER is defamatory.

B. The First Amendment Precludes The Grand Jury Investigation

Prosecution of petitioner under the mail fraud statute would violate the First Amendment. So, too, does the the grand jury proceeding. Theinvestigation creates those chilling effects which cause self-censorship, that "self-imposed restriction of free expression" which undermines the guarantees of the First Amendment. Smith v. California.,

supra, at p. 151. The Court has recognized that self-censorship is stimulated by pressures inherent in civil and criminal legal proceedings against authors or publishers. (e.g., New York Times v. Sullivan, supra; Smith v. California, supra.)

These pressures include heavy costs of defense, the months lost to preparation for trial, fear of possible imprisonment or fine, the stigma on the author (despite ultimate vindication), press criticism, and the risk that the author's publisher - intimidated by the investigtion - might withdraw the book. As the Court has indicated, authors whose factual statements are true nonetheless may yield to self-censorship under these pressures, and because of "the difficulties of adducing legal proofs" that the statements challenged

by the government or a private party indeed were true. (New York Times v. Sullivan, supra, at p.279).

In addition to the hearsay evidence rule, which would drastically hamper the writing of history, biography and journalism were authors forced by by self-censorship to apply it in their work, there is the lurking danger that individuals who provided information for the the author's challenged account may die, disappear, refuse to testify, withhold documents, or even deny or recant the statements made to the author - or give a contradictory statement to the grand jury or trial court - under official or private pressure, or inducement; posing the further risk that the author might be indicted for perjury if he testified before the grand jury.

Faced with these chilling

effects of a grand jury investigation or prosecution, some authors will avoid publishing true factual statements about government policies, public officials, or powerful intererst or individuals, for fear of incurring the costs, burdens and other painful consequences that would flow from the decision below. That self-censorhip, "would be a self-censorship affecting the whole public, hardly less virulent for being privately administered." Smith v. California, 361 U.S. 147, 154.

The decision below would permit grand jury investigation and mail fraud prosecution for any allegedly false factual statement in a book , which the government claimed induced a publisher to disseminate the work. But even if the decision had been limited to charges of fabricated accounts of interviews that allegedly never occcurred, some authors

who had conducted interviews might suppress reports of them for fear that in a grand jury investigation or prosecution, a "Deep Throat" or other "source" might refuse to confirm the interview or might deny it took place.

C. There Is No Compelling Interest That Justifies Grand Jury Probes Of A Book's Truth or Falsity.

The need to maintain First Amendment protection for false as well as true factual statements, to preserve the essential "breathing space" for freedom of expression, is far more "compelling" and "overriding" than the government's need to investigate or prosecute an author because his/her book contained allegedly false factual statements. The inhibiting future effect of such an investigation or prosecution on the freedom of expression of other authors, journalists, broad-

casters and film makers far more injures the public interest than the government's inability to investigate or prosecute the petitioner for publishing such statements in GOD'S BROKER. In addition to the First Amendment's compelling interest in protecting freedom of expression against the chilling effects of grand jury investigation or prosecution, these factors must be considered:

(a) Alleged false statements in a published work should be challenged and exposed in the marketplace of ideas. This, rather than government investigation or punishment, is the remedy prescribed by the First Amendment. "(t)he best test of truth is the power to get itself accepted in the competition of the market... That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919)

(Holmes, J., joined by Brandeis, J., dissenting). Thus, in Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 898-99 (D.C. Cir. 1984), the Court held invalid a governmental restraint imposed on a political message because of its alleged falsity. The truth of GOD´S BRO KER´s accounts of petitioner´s claimed Papal interviews already has been challenged in the marketplace of ideas. Newspapers and magazines have reported the charges by Vatican representatives and others that the book´s reports of those interviews were untrue. See, e.g.: "New Book on Pope Cause of Disagreement Between Vatican and Author", NEW YORK TIMES, May 20, 1984, page 61, Col. 1.

(b) If the petitioner´s publisher and the putative motion picture producer were defrauded by petitioner´s

acccounts in GOD´S BROKER of the Papal interviews, they have adequate remedies against him at civil law. Indeed, the producer already has invoked those remedies by filing a counterclaim for fraud in a suit petitioner brought against him for breach of contract.

(c) History does not support the claim of a compelling governmental need to investigate the alleged falsity of factual statements in published books or prosecute authors on the ground that these statements defrauded their publishers. The Republic has survived for two centuries without such inquisitions. In that time, "hoax" books, or alleged "hoax" books, have been published, and exposed in the marketplace of ideas.

(d) The First Amendment interest in shielding freedom of expression precludes a finding or assumption that petitioner´s

publisher was defrauded by GOD'S BROKER'S accounts of the Papal interviews. Such protracted conversations with the Pope are highly unique, and unusual. While book publishers cannot check the truth of every factual statement in an author's manuscript, a publisher's professional and moral responsibility to readers and and customers should impel it to verify the bona fides of such an unusual account before publishing the book. Public policy, and the overriding First Amendment interest, preclude the government from claiming "fraud", or an attempt to "defraud" the publisher or putative motion picture producer.

2. The First Amendment Precludes The Government From Compelling The Petitioner To Testify Or Provide Documents To The Grand Jury.

Even if the First Amendment does not bar a grand jury investigation (or

a prosecution) for mail fraud, there is - we submit - a serious First Amendment question which requires the Court's consideration, and warrants granting of the writ.

If the petitioner had invoked the Fifth Amendment, he could not have been compelled to testify about the challenged portions of GOD'S BROKER, nor for ced to produce his notes or records relating to them. The Authors League submits that the First Amendment also prevents the government and the courts from compelling an author to testify or produce documents concerning the falsity or truth of his/her writings. This Court has stressed that the First Amendment prohibits government from placing "the burden of proving the truth on the speaker, cf. Speiser v. Randall, 357 U.S. 513, 525-526", New York Times

v. Sullivan, 376 U.S. 254, 271.

In Talley v. California, 362 U.S. 60 (1960), striking down an ordinance that banned distribution of anonymous handbills, the Court noted that anonymous publications "have played an important role in the progress of mankind" and that prohibiting their anonymity would tend to restrict "freedom of expression" by exposing their authors to prosecution for publishng these works, citing other examples of this aspect of First Amendment protection against self-incrimination, Bates v. Little Rock, 361 U.S. 516 and N.A.A.C.P. v. Alabama, 357 U.S. 449,462 (362 U.S., at pp. 64-65)

These decisions manifest a strong First Amendment objection to compelling authors to provide evidence as to the alleged falsity of their books.

The Court of Appeals indicated that petitioner was obliged to plead the Fifth Amendment to avoid producing documents. But that plea is commonly read as a confession of guilt; here, a confession of writing falsehoods. We submit the First Amendment protects an author against the pressure to make that "confession", one of censorship's primary objectives.

CONCLUSION

The Authors League of America respectfully submits that a writ of certiorari should be granted.

Respectfully submitted,

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